AMANAH MERCHANT BANK BHD.

v.

LIM TOW SENG & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. D2-23-1218-88]
7 FEBRUARY 1990

BANKING: *Appeal against O. 14 judgment - Guarantee executed in respect of Revolving Bankers Acceptance Facility pursuant to agreement - Issue whether renewal valid - Whether pleadings defective due to absence of averment with regards the renewal of the said facility - Whether issue fatal to the plaintiff's case - Whether claim is unfounded where there is no evidence of extension of the said facility - Whether guarantee discharged - Section 86 Contracts Act 1950.*

The plaintiff's claim against the second and third defendants is founded on a guarantee dated 3 October 1984. The guarantee was executed in respect of a revolving bankers acceptance facility of RM2 million (the facility) which had been granted by the plaintiff to E&S Holdings Bhd., its subsidiaries and associated companies (the borrowers) pursuant to an agreement signed between them on 20 September 1984.

Under Clause 5 of the agreement, the facility was for a period of one year from 12 June 1984 - 11 June 1985 and thereafter may be renewed for further successive years as shall be mutually agreed between them.

On 23 August 1985, after the expiry of the facility under the agreement, the plaintiff wrote to the borrowers, making available the same facility for a further period of 1 year to end on 22 August 1986. Other than this, all other terms and conditions as contained in the agreement dated 20 September 1984 remain unchanged subject always to the plaintiff's right to recall the facility on demand.

On 26 April 1989, final judgment under O. 14 was entered and the defendants in their appeal before the Court raised the following issues:

(1) Whether the plaintiff's letter dated 23 August 1985 amounts to a renewal of the facility granted under the agreement dated 20 September 1984 or whether it is a new facility altogether.

(2) Whether the statement of claim is defective in that it failed to disclose the basis of the amount claimed.

(3) The claim is unfounded since there is no evidence of any extension of the facility after 23 August 1986 and since the amount claimed is for the period after 23 August 1986, the guarantee is discharged by reason of s. 86 Contracts Act 1950.

Held:

[1] Admittedly the renewal took place after 12 June 1985, the date of expiry of the facility, but this fact alone does not, alter the character of such renewal, for if indeed a fresh facility was intended, the language used in the letter dated 23 August 1985 does not express such an intention.

[2] Since Clause 11 of the guarantee identifies the guarantee to be a continuing guarantee that covers not only present but also future transactions and since there is no express provision in the guarantee that requires the defendants to be informed of any renewal of the

facility, but on the contrary, there is Clause 8 which gives the plaintiff the power to renew without the guarantor's consent, there is therefore no merit to the defendant's contention that the guarantee does not cover advances granted up to 22 August 1986.

[3] Since amendments can be ordered at any stage of the proceedings so as to lay bare the nature of the issues at hand, I had allowed the plaintiff's oral application to amend the statement of claim by the inclusion of the provisions of Clause 5 of the agreement.

[4] Since there is already a letter produced by the plaintiff, evidencing the extension of the facility until 22 August 1986, I would expect that in the course of normal banking practice, the plaintiff would issue letters similar to the letter dated 23 August 1985 to effect further renewals, but none was produced and neither was there any explanation given why the renewal after 23 August 1986 was not documented and since such a renewal is strenuously denied, an issue arises as to whether there was a further renewal after 23 August 1986.

[5] For the reasons I have given, I had allowed the defendants' appeal to the extent that leave be given to them to defend the amount of RM1,675,000 but judgment be entered against them with costs for the remaining RM325,000.

[The defendants at liberty to amend statement of defence and the costs of the appeal to be costs in the cause.]

Legislation referred to:
Contracts Act 1950, s. 86

For the plaintiff/respondent - P.M. Tan; M/s. Nik Hussain & Partners
For the 2nd & 3rd defendants/appellants - M.T. Teh; M/s. Megat Najmuddin Leong & Co.

JUDGMENT

Siti Norma Yaakob J:

The plaintiff's claim against the 2nd and 3rd defendants (the defendants) is founded on a guarantee dated 3 October 1984. The guarantee was executed in respect of a Revolving Bankers Acceptance Facility of RM2 million (the facility) which had been granted by the plaintiff to Emporium & Supermarket Holdings Bhd., its subsidiaries and associated companies (the borrowers) pursuant to an agreement signed between them on 20 September 1984.

Under Clause 5 of the agreement, the facility was for a period of one year from 12 June 1984 - 11 June 1985 and thereafter may be renewed for further successive years as shall be mutually agreed between them.

On 23 August 1985, after the expiry of the facility under the agreement, the plaintiff wrote to the borrowers, making available the same facility to the borrowers for a further period of 1 year to end on 22 August 1986. Other than this, all other terms and conditions as contained in the agreement dated 20 September 1984 remain unchanged subject always to the plaintiff's right to recall the facility on demand.

On 26 April 1989, final judgment under O. 14 was entered against the defendants and in their appeal before me, the defendants raised the following issues:

1. Whether the plaintiff's letter dated 23 August 1985 amounts to a renewal of the facility granted under the agreement dated 20 September 1984 or whether it is a new facility altogether.

2. Whether the statement of claim is defective in that it failed to disclose the basis of the amount claimed.

3. The claim is unfounded since there is no evidence of any extension of the facility after 23 August 1986 and since the amount claimed is for the period after 23 August 1986, the guarantee is discharged by reason of s. 86 Contracts Act 1950.

Since Clause 5 of the agreement allows for further successive extensions of the facility by mutual agreement between the borrowers and the plaintiff after the expiry of the first year of the facility and since the plaintiff's letter dated 23 August 1985, had been acknowledged by Lim Tow Choon, the 2nd defendant, in his capacity as director of the borrowers, it can only mean that such a letter is the approval of an extension of the facility for another year from 23 August 1985 to 22 August 1986. This is clearly borne out by the language used in para. 1 of the letter which alludes to the availability of the facility for a further period up to 22 August 1986.

The fact that the plaintiff makes reference to the other terms and conditions contained in the agreement dated 20 September 1984 as still binding on the extended facility as expressed in para. 2 of the letter, dispels any notion that the letter was intended to refer to the approval of a fresh facility as contended by the defendants. Admittedly the renewal took place after 12 June 1985, the date of expiry of the facility, but this fact alone does not, I consider, alter the character of such renewal, for if indeed a fresh facility was intended, the language used in the letter dated 23 August 1985 does not express such an intention. Since Clause 11 of the guarantee identifies the guarantee to be a continuing guarantee that covers not only present but also future transactions and there is no express provision in the guarantee that requires the defendants to be informed of any renewal of the facility, but on the contrary, there is Clause 8 which gives the plaintiff the power to renew without the guarantors' consent, there is therefore no merit to the defendants' contention that the guarantee does not cover advances granted up to 22 August 1986.

The plaintiff's cause of action is founded on the successive renewals of the facility, but this fact is not pleaded in the statement of claim but only disclosed in the affidavits. For this very reason, the defendants maintain that the absence of the averment to the renewals of the facility is fatal to the plaintiff's case as it has the effect of making the statement of claim defective.

I consider that this defect can be cured by amending para. 3 of the statement of claim with the inclusion of the following words after that paragraph "and extended by a letter dated 23 August 1985 and thereafter by agreement between the parties".

An oral application to that effect was indeed made by the Counsel for the plaintiff and the defendants cannot possibly object to their amendment on the ground that they are taken by surprise as they have never raised any objection to the omission of the averment on renewals before, but only now, for the first time, before me. They had, from the beginning, proceeded on the basis that the plaintiff's letter dated 23 August 1985 was not a renewal but the granting of a fresh facility altogether.

Since amendments can be ordered at any stage of the proceedings so as to lay bare the nature of the issues at hand, I had allowed the plaintiff's oral application to amend para. 3 of the statement of claim by the inclusion of the provisions of Clause 5 of the agreement.

The plaintiff's letter dated 23 August 1985 provides the necessary proof that the facility was renewed for another year until 22 August 1986. After that date the plaintiff also contend that there had been a further extension until 22 August 1987, which is denied by the defendants.

Since there is already a letter produced by the plaintiff, evidencing the extension of the facility until 22 August 1986, I would expect that in the course of normal banking practice, the plaintiff would issue letters similar to the letter dated 23 August 1985 to effect further renewals, but none was produced and neither was there any explanation given why the renewal after 23 August 1986 was not documented and since such a renewal is strenously denied, an issue arises as to whether there was a further renewal after 23 August 1986. It was for this reason that I had allowed part of the defendants' appeal by giving them leave to appeal for the sums advanced after 23 August 1986, but allowed judgment for that part of the claim that had been advanced to the borrowers during the renewal period between 23 August 1985 - 22 August 1986. It is not disputed that between 5 November 1986 - 4 February 1987, the plaintiff had advanced RM1,675,000 to the borrowers and it is on this sum that I had ordered leave to defend but allowed judgment to be entered against the defendants for the balance sum of RM325,000 as that sum represents the amount advanced during the currency of the first renewal from 23 August 1985 to 22 August 1986. Other objections taken by the defendants have all been rebutted by documentary evidence. These include the defendants' contention that there was no agreement made between the borrowers and the plaintiff as the agreement dated 20 September 1984, on which the borrowers' liability arose, was signed by Emporium & Supermarket Holdings Bhd. and not jointly with the Emporium's subsidiaries, and its associated companies.

Admittedly Emporium's subsidiaries and associated companies are separate legal entities but there is no entity called "Emporium & Supermarket Holdings Bhd., its subsidiaries and associated companies" as such, but when that expression is used, it can only mean that the facility was intended to benefit not only the holding company but also its subsidiaries and associated companies. Viewed in that light, there is no necessity for all Emporium's many subsidiaries and associated companies to sign the agreement dated 20 September 1984 as the seal of the holding company alone is sufficient to acknowledge the right and obligations of the parties under the agreement.

There is also the defendants' objection that since the facility was utilised by a third party with whom the plaintiff had no contractual obligations whatsoever the defendants cannot be made answerable for its indebtedness.

I consider that this contention merits no consideration whatsoever as Clause 16 of the agreement dated 20 September 1984 identifies Klasse Department Store Sdn. Bhd., the third party and an associate company of the borrowers to be one of the beneficiaries of the facility. This clause had been added and agreed to by the borrowers and the defendants as the directors of the borrowers cannot now maintain that they were not aware who were to benefit from the advances.

For the reasons I have given, I had allowed the defendants' appeal to the extent that leave be given to them to defend the amount of RM1,675,000 but judgment be entered against them with costs for the remaining RM325,000. In view of the amendments that I had ordered to para. 3 of the statement of claim, I had also allowed the defendants liberty to amend the statement of defence and that the costs of the appeal be costs in the cause.

Also found at [1992] 1 CLJ 647